sight the initial stages and fastening (their) attention exclusively on the final stage in the production of the income." On the facts of the case under review it could not be denied that the initial stages were carried out in Malaysia, so that if I am right in following and applying the *ratio decidendi* of *Kirk's* case, I must come to the conclusion that this source of income is chargeable to tax.

In the result, I therefore confirm the Special Commissioners' assessment of income tax on an estimated profit of $7,150,000 for the years in question.

(ix) *Losses re "Tamil Malar."*

Though the Tamil Malar was published in Malaya, the Special Commissioners found that the appellant had established a branch office in Singapore, and that this branch office was a separate establishment.

This finding of fact disposes of any claim for the deduction of the losses sustained by the Singapore Branch, as this court is bound by the decision of the Federal Court in *H.H. Co. Sdn. Bhd.* v. *Director-General of Inland Revenue*[11] that losses sustained by a Singapore branch which is a separate establishment cannot be brought in as a deduction in assessing the chargeable income of a taxpayer in Malaysia. That judgment was only delivered on January 19, 1976, after the Special Commissioners had made their Deciding Order, and wholly supports it. See also *U.N. Finance Bhd.* v. *D.G.I.R.*[12]

(x) *Loans*

It has not been shown to the Special Commissioners or to me that the personal interest-free loan to V.M. Sundram was connected with either his fragmentation or his money-lending businesses, or that the amounts subscribed to the Malayan Times Ltd., now in the hands of receivers, were anything more than investment write-offs. Neither could properly qualify as deductions within those permitted in the tax law.

Judgment

In all the circumstances of the case, it has not been shown to me nor am I for myself able to ascertain that the Deciding Order of the Special Commissioners erred in any way.

I therefore confirm the Deciding Order.

Appeal dismissed.

Solicitors: *Jayadeva & Zahir.*

THIANGIAH & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Ajaib Singh J.) September 15, 1976]

[Seremban — Criminal Appeal No. 3 of 1976]

Criminal Law and Procedure — "Attempt" — Meaning of — Appellants convicted under ss. 381 and 511 of the Penal Code read with s. 34 — Issue of whether act constitutes "attempt" within meaning of s. 511 of the Penal Code — Penal Code, ss. 34, 381 & 511.

In this case the first appellant was a senior conductor of the estate while the second appellant was a field worker who worked directly under the supervision of the first appellant. The first appellant was responsible for the bags of fertiliser taken out of the store. Both the appellants had only a day earlier taken back to the store in the first appellant's car 4 bags of fertiliser out of the 11 bags which were not used for the day. They returned to the place with the car between 6.30 p.m. and 7.00 p.m. when they were stopped from loading the remaining 7 bags into the car. Both the appellants were convicted under sections 381 and 511 of the Penal Code read together with section 34 of the Code. They appealed against the decision of the learned magistrate.

Held: (1) the mere forming of an intention to commit a crime and making preparations for its commission are not criminal acts and are not punishable under the law. There must be some further overt act on the part of the offender which is directed towards the actual commission of the crime and which is immediately and not remotely connected with the crime in order to constitute an attempt within the meaning of section 511 of the Penal Code;

(2) the appellants might well have had the intention to steal the bags and might well have come prepared to take them away for their own use. But this was insufficient to constitute an attempt to steal. The overt acts of the appellants fell short of the actual attempt to steal as the acts were not immediately connected with the offence of theft.

CRIMINAL APPEAL.

A.K.J. D'Cruz for the appellants.

Razalli bin Hassan (Deputy Public Prosecutor) for the respondent.

Ajaib Singh J.: This was an appeal from the decision of the learned magistrate whereby the appellants were convicted under sections 381 and 511 of the Penal Code read together with section 34 of the Code. The first appellant was sentenced to one day's imprisonment and fined $1,500 in default six months' imprisonment and the second appellant was sentenced to one day's imprisonment and fined $500 in default three months' imprisonment.

The appellants were originally charged with theft of 7 bags of fertiliser valued at $108 the property of Ulu Sawah Division of Kombok Estate in the District of Seremban. The brief facts of the prosecution case before the learned magistrate were as follows. The first appellant was a senior conductor of the estate while the second appellant was a field worker who worked directly under the supervision of the first appellant. On November 4, 1974 the first appellant started manuring work on part of the estate with 60 bags of fertiliser taken out of the estate store. The fertiliser was issued by the store-keeper and according to standing instructions all unused bags of fertiliser were to be taken back to the store at the end of the day's work. For this purpose the management provided vehicles such as tractors, trailers and lorries for the conveyance of the bags to and from the fields. The transport was the responsibility of the store-keeper. On November 5, 1974 the first appellant was issued with 104 bags of fertiliser and at 6.15 p.m. on that day he brought back

4 bags of fertiliser to the store in his own car. The store-keeper made no record of this in his stock-book but he admitted receiving those 4 bags on that day. On November 6, 1974 74 bags of fertiliser were issued to the first appellant. That day being a pay-day the labourers did not want to work overtime after 2.00 p.m. and as a result the manuring could not be completed on that day and the first appellant sent back 10 bags of fertiliser to the store by means of a tractor. The return of these 10 bags of fertiliser was recorded by the store-keeper.

The procedure with regard to the manuring of the estate was that once work was commenced on a particular part of the field it should continue from day to day until it was completed and that the manuring of another part of the field should not begin until the first part was completed. On the morning of November 6 the assistant manager of the estate went on an inspection of the fields and found that 5 acres in the first part of the field had not been manured. He also found 6 bags of fertilisers at two places which were not the normal places for the unloading of fertiliser. This aroused his suspicion and he decided to set up an ambush. Meanwhile unknown to the assistant manager the watchmen of the estate had set up an ambush of their own over the bags of fertiliser from the evening of November 5, 1974 until about 1 a.m. but without any result. This ambush by the watchmen was laid as a result of what one of them had found and seen when he was going on his usual rounds on November 5, 1974 after the labourers had stopped work on that day. While on his rounds this watchman came across not 6 but 7 bags of fertiliser at three different spots and while he was there he saw the second appellant coming towards that place. On seeing this the watchman hid himself behind a tree and saw the second appellant removing the bags from where they were on the roadside and hiding them behind the trees. This aroused the suspicion of the watchman and he and another watchman then laid the ambush.

On November 6, 1974 another ambush was laid at the same place. At about 7.00 p.m. the first and second appellants drove up to the scene of the ambush in the first appellant's car. The car stopped and the second appellant got out of the car and started to load the bags of fertiliser into the car. He had loaded a few bags when he was stopped by the ambush party and both the appellants and the car were detained. Subsequently the police arrived there and took the appellants and the car into their custody.

At the end of the prosecution case the learned magistrate held that the theft had not been complete but that an attempt to commit theft had been made by the appellants. He accordingly amended the charge to one of attempted theft of 7 bags of fertiliser and called upon the appellants to make their defence.

The first appellant said in his evidence that he was a senior conductor in the estate and was in charge of tapping and all field work which including manuring. On November 4, 1974 he was entrusted with a certain number of bags of fertiliser for manuring. He engaged 17 labourers and used 60 bags of fertiliser. On November 5, 1974 he took out 104 bags out of which only 93 bags were used. Of the remaining 11 bags he brought 4 bags back to the store in his car at about 6.30 p.m. In the car with him were one Ramasamy the mandore and the second appellant. He said that he made use of his car as there was no tractor available. When he put the 4 bags in the store he told the assistant manager that 7 bags still remained in the field and that about 7 more acres had to be manured. He said that the assistant manager then told him to leave the bags there and to complete the work on the following day. The 7 bags were therefore left in the field that night. As against this statement of the first appellant the evidence of the assistant manager was that on November 5, 1974 he did not go to work as he was ill at home.

On November 6, 1974 the first appellant commenced manuring the field and completed the work at 2.00 p.m. covering about 60 acres. He was issued with 74 bags of fertiliser out of which 10 bags were not used and these were brought back to the store on a tractor. As for the 7 bags which were left overnight in the field from the 104 bags issued to him on November 5, 1974 the first appellant said that his intention was to use them in the afternoon in order to complete that part of the field which was left unmanured on November 5 but the workers did not turn up for work that afternoon as it was pay-day. He informed the assistant manager about this who told him to arrange for a tractor to bring back the 7 bags. He looked for the tractor driver in his house as the tractor was there but could not find the driver. He came to the office and did some office work until 6.30 p.m. for the latex lorry to be dispatched. After 6.30 p.m. he still could not find the tractor driver and he therefore decided to bring the 7 bags of fertiliser back in his car. The tractor driver's evidence however was that he was at home throughout the day after finishing work at 2.00 p.m. Continuing his evidence the first appellant said that as he was about to leave to fetch the bags he met the second appellant and he took him along for assistance. They reached the field around 6.45 p.m. or 7 p.m. and after they had loaded some bags into his car the estate watchman stopped the second appellant from loading any more bags. He said he asked the watchman what was the matter and the watchman replied that he had instructions from the assistant manager to stop anyone from removing the bags. The watchman then took away the car key. The police then arrived and he and the second appellant were taken away. He said he explained to the estate manager that he was using his car as there was no tractor available.

In cross-examination he said that on November 5, 1974 he could bring back only 4 bags to the store because he had two passengers in his car. There were 7 acres left to be manured and he wanted to find out from the assistant manager what to do with those bags as the tractor was not available. He admitted that he was looking for the tractor as he had earlier received instructions not to leave the bags in the field. He said that the assistant manager had told him that if the tractor driver was not available he should go and bring the bags in his car. He said that the tractor driver was lying when he said during the case for the prosecution that he was all the time in his house. In re-examination he said that he had instructed the second appellant to carry the 7 bags of fertiliser away from the road for fear that the bags might be carried away by

people passing that way. He said that he saw nothing wrong in using his car and to collect the bags at 7.00 p.m. In answer to the court he said that the assistant manager had purposely and deliberately fixed him up but he could not give any reason for making these allegations.

The second appellant said that he was a field worker in the estate and that on November 4, 5 and 6 1974 he was in the manuring gang. He was also loading and unloading bags of fertiliser from the tractor. On November 5, 1974 he stopped work at 6.30 p.m. and returned the empty bags to the store. After that the first appellant told him to get 4 bags from the estate. He and the first appellant went back to the field and brought back 4 bags to the store. At that time he also removed 7 bags away from the road on the instructions of the first appellant. He denied that he was hiding the bags. On November 6, 1974 he finished work at 1.30 p.m. and returned home. He did not work overtime as it was pay-day. At about 6.30 p.m. he went to the house of the tractor driver who was his uncle but not finding him at home he was returning when he saw the first appellant in the office. The first appellant asked him to go along with him to collect the 7 bags. The first appellant said that the tractor was not available. The store-keeper was still there in the office.

At the end of the trial the learned magistrate found the appellants guilty and convicted them on the amended charge. In his grounds of decision the learned magistrate summarised the evidence which I have briefly set out above. He said that the defence in a nutshell was that the second appellant merely acted on the instructions of the first appellant and that the first appellant was all along acting in good faith. The whole incident was carefully planned and purposely created by the assistant manager. In short the trap was purposely laid by him. The learned magistrate rejected the evidence of the appellants as untrue and improbable. In the event he held that the explanations given by the appellants did not in any way create the slightest doubt in his mind as to their guilt.

On the amended charge the prosecution had to prove that the appellants were the servants of Kombok Estate, that the 7 bags of fertiliser were in the possession of the Estate at the relevant time, that the appellants attempted to steal those bags and that they acted in furtherance of their common intention of attempting to steal the bags.

With regard to the first two ingredients there was clear and conclusive evidence before the learned magistrate that the appellants were employees of the Kombok Estate and that the 7 bags of fertiliser were in the possession of the Estate. There was evidence also if accepted, as the learned magistrate had indeed done, to conclude that the appellants had acted in furtherance of a common intention but I would hesitate to say further that there was sufficient evidence in this case to establish that their actions were in furtherance of the common intention towards the commission of a criminal act under section 34 of the Penal Code. The criminal act alleged against the appellants was that they had attempted to commit theft of the bags but in my view the evidence adduced in the lower court fell short of establishing this ingredient beyond reasonable doubt. An attempt to commit an offence is punishable under and in accordance with the provisions of section 511 of the Penal Code which without the illustrations reads as follows:—

"Whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of such offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence: Provided that any term of imprisonment imposed shall not exceed one-half of the longest term provided for the offence."

There are four stages in every crime. First an intention to commit the crime, secondly the preparation for its commission, thirdly the attempt to commit it and finally the actual commission of the crime. The mere forming of an intention to commit a crime and making preparations for its commission are not criminal acts and are not punishable under the law. There must be some further overt act on the part of the offender which is directed towards the actual commission of the crime and which is immediately and not remotely connected with the crime in order to constitute an attempt within the meaning of section 511 of the Penal Code. If the attempt succeeds the crime is completed and the offender will face a charge for the substantive offence. On the other hand a crime is not completed if something should happen when the attempt to commit it is being made breaking the chain of events which if not for the intervening interruption would have led to the consummation of the crime. In such an event the offender will be liable under section 511 of the Penal Code.

Stephen's time-honoured definition of an attempt is valid and strong as ever today: "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts, which would constitute its actual commission if it were not interrupted." Each particular case must be decided on its merits. Whether the act of an offender would amount to an attempt to commit a crime or not must depend on the facts and circumstances of each case. In the present case the appellants were employees of the estate. The first appellant was responsible for the bags of fertiliser taken out of the store. Both the appellants had only a day earlier taken back to the store in the first appellant's car 4 bags of fertiliser out of the 11 bags which were not used for the day. They were now back at the place with the car just before dusk between 6.30 p.m. and 7.00 p.m., not an unusually odd hour as to raise any suspicion against the appellants, when they were stopped from loading the remaining 7 bags into the car. In these circumstances it certainly could not be said that at this stage the acts of the appellants were in any way criminal. They might well have had the intention to steal the bags and might well have come prepared to take them away for their own use. But this was insufficient to constitute an attempt to steal. In the circumstances of this case the overt acts of the appellants fell short of the actual attempt to steal as the acts were not immediately connected with the offence of theft. What offence would the appellants have committed if they had not been interrupted by the ambush party? The answer to this question plainly is: No offence. It

would have been a very different matter if the appellants had been outsiders and not employees of the estate or if they had even as employees come out to pick the bags at some very late hour of the night or in the very early hours of the morning.

The apprehension of the appellants was indeed premature. The ambush was sprung a little too soon. A few more minutes would have been sufficient to find out if the appellants were intending to take the bags to the store or out of the estate itself or to some unauthorised or secret place and this would have afforded ample proof of their guilt or innocence. In all the circumstances of the case therefore I did not think that the evidence adduced in the lower court was sufficient to establish a case against the appellants beyond reasonable doubt. I accordingly set aside the conviction and sentences against the appellants and ordered that they be acquitted and discharged.

Appeal allowed.

Solicitors: *A.K.J. D'Cruz & Co.*

SUBRAMANIAM v. MENTERI HAL EHWAL DALAM NEGERI & ORS.

[O.Cr.J. (Abdul Hamid J.) September 24, 1976]
[Kuala Lumpur — Criminal Application No. 13 of 1976]

Administrative Law — Preventive Detention — Failure to consider written representations of detenu within three months of detention — Whether breach of substantive right or merely a matter affecting procedure — Whether continued detention unlawful — Emergency (Public Order and Prevention of Crime) Ordinance, 1969, s. 6(1) — Federal Constitution, art. 151.

The applicant applied that a writ of *habeas corpus* be issued for his release. The applicant had been detained for a period of two years under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969. He had made written representations against the order of detention but no inquiry had been held, although three months had elapsed since his detention. It appeared from an affidavit filed by the Secretary of the Advisory Board that the representations of the applicant were received on November 15, 1976 and had been fixed for hearing on September 21, 1976.

Held: (1) it is probably open to a detenu to say that by right the Advisory Board should hear his representations and make recommendations thereon within three months but it is obvious that such a right cannot be held to be a real and substantial right of a citizen guaranteed by the Constitution an infringement of which may justify the court to award a Writ of *Habeas Corpus;*

(2) in this case there has been a failure to comply with the statutory direction but mere non-compliance with the directory provision, so long as the Advisory Board considers the representations and makes its recommendations, should not render unlawful a detention lawfully made.

Cases referred to:-

(1) *Dharam Singh* v. *State of Punjab* A.I.R. 1958 S.C. 152.

(2) *Abdul Karim* v. *State of West Bengal* A.I.R. 1969 S.C. 1028.

(3) *S. Mukherjee* v. *State of West Bengal A.I.R.* 1972 S.C. 1356.

(4) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 M.L.J. 129.

CRIMINAL APPLICATION.

Karpal Singh (*K. Kumaraendran* and *K. Balasundram* with him) for the applicant.

Abdul Kadir Musa, Federal Counsel, for the respondents.

Abdul Hamid J.: The applicant Subramaniam s/o Muthiah @ Muthiya has asked that a Writ of *Habeas Corpus* be issued to direct the Menteri Hal Ehwal Dalam Negeri Malaysia, Ketua Polis Negara Malaysia and the Penguasa Kanan Pusat Pemulihan Akhlak, Pulau Jerejak, the respondents, to have the applicant brought before this court to undergo and receive all and singular such matters and things as this court shall then and there consider concerning him upon the grounds set forth in his affidavit.

It is claimed that the applicant is a Malaysian citizen. He was detained for a period of two years under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969 (I shall hereafter call "the said Ordinance") at the Pulai Jerejak Rehabilitation Centre under an order of detention dated 5th of March 1976 made by the Menteri Hal Ehwal Dalam Negeri Malaysia. The applicant made written representations against the said order to the Chairman of the Advisory Board on March 15, 1976 and to-date no enquiry has been held by the Advisory Board.

The facts do not seem to be in dispute.

It is the applicant's contention that his detention exceeding three months is not in compliance with section 6 of the said Ordinance and the mandatory provisions of Article 151(1)(b) of the Federal Constitution thereby rendering his continued detention after 5th of June 1976 unconstitutional.

An affidavit in reply was filed by N.S. Hullon Secretary to the Advisory Board stating that the applicant was arrested on 8th of June 1976 and the order of detention was made on 15th of March, 1976. The applicant made representations on 15th of March, 1976 and they have been submitted to the Chairman Advisory Board and have been fixed for hearing on 21st of September, 1976.

For easy reference I set out below the relevant provisions alleged to have been infringed, namely, (a) section 6(1) of the said Ordinance and (b) Article 151(1)(b) of the Federal Constitution — (I shall hereafter call "the impugned Article").

(a) "6. (1) Whenever any person has made any representations under section 5(1) to an Advisory Board, the Advisory Board, shall within three months of the date on which such person was detained, consider such representations and make recommendations thereon to the Yang di-Pertuan Agong."

(b) "151. *Restrictions on preventive detention.*

(1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention —

(a) ....

(b) no citizen shall be detained under that law or ordinance for a period exceeding three months unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong."